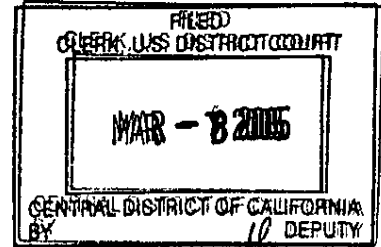


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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DESHANN TRAYLOR,
et al.,

Defendants.

CASE NO. CR 03-1291-DSF

ORDER DENYING MOTION OF
 DEFENDANT PURVIS TO SUPPRESS
 AND DENYING REQUEST FOR
FRANKS HEARING

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I. INTRODUCTION

Defendant Danny Purvis ("Purvis") moves to suppress all electronic surveillance evidence and evidence derived from such evidence, alleging that the government made inadequate efforts at "minimization." He also seeks an evidentiary hearing under Franks v. Delaware, 438 U.S. 154 (1978) to address the issue of "necessity."

The investigation underlying this motion involved the wiretapping, authorized by the Honorable A. Howard Matz ("Judge Matz"), of three separate telephones based on affidavits signed by Patrick J. Sullivan ("Sullivan"), a Special Agent of the Federal Bureau of Investigation ("FBI"). In their companion motion, Defendants Elizabeth Vasquez and Deshann Traylor have provided all relevant documentation relating to the wiretap authorizations. Few, if any, facts

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1 are in dispute. The parties generally disagree only as to the conclusions to be
2 drawn from those facts. Therefore the Court cites only such facts as are necessary
3 to an understanding of the Court's ruling.

4 For the reasons set forth here, the motion is DENIED.

5 6 II. STATEMENT OF FACTS

7 On December 12, 2002, the government filed a wiretap application for
8 target telephone number (213) 798-7720 ("Target Telephone 1") subscribed to by
9 Deshann Traylor ("Traylor") and target telephone number (323) 997-5270
10 ("Target Telephone 2") subscribed to by Shalia V. Jones but used by Purvis.
11 Vasquez & Traylor Ex. A. Sullivan filed an affidavit ("Sullivan Aff.")¹ in support
12 of this application. Vasquez & Traylor Ex. B. On December 19, 2002, Judge
13 Matz signed an order authorizing interception of calls on these target telephones.
14 Vasquez & Traylor Ex. C.²

15 On January 17, 2003, the government filed a second wiretap application for
16 continued interception of Target Telephone 1 and Target Telephone 2, as well as
17 for interception of target telephone number (323) 449-9917 ("Target Telephone
18 3") subscribed to by Avonne Lee, but used by Traylor. Vasquez & Traylor Ex. D;
19 Vasquez & Traylor Ex. E at p. 50. Sullivan filed an affidavit in support of this
20 application. Vasquez & Traylor Ex. E. On January 17, 2003, Judge Matz signed
21 an order authorizing interception of calls on these target telephones. Vasquez &
22 Traylor Ex. F.

23
24
25 ¹ Purvis's arguments are directed primarily at the Sullivan Affidavit submitted with the
26 December 12 Application. Therefore, the Court cites only to this affidavit in analyzing
27 Purvis's arguments.

28 ² Exhibit C itself is not signed, but the Court assumes a signed version exists, as no
Defendant raises this issue.

1 On February 14, 2003, the government filed an application for continued
 2 interception of Target Telephones 1, 2, and 3. Vasquez & Traylor Ex. G. Sullivan
 3 filed an affidavit in support of this application. Vasquez & Traylor Ex. H. On
 4 February 14, 2003, Judge Matz signed an order authorizing continued interception
 5 of calls on these target telephones. Vasquez & Traylor Ex. I.

6 On March 13, 2003, the government filed an application for continued
 7 interception of Target Telephones 1, 2, and 3. Vasquez & Traylor Ex. J. Sullivan
 8 filed an affidavit in support of this application. Vasquez & Traylor Ex. K. On
 9 March 13, 2003, Judge Matz signed an order authorizing continued interception of
 10 calls on these target telephones. Vasquez & Traylor Ex. L.

11 12 III. LEGAL STANDARD

13 “Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18
 14 U.S.C. §§ 2510-2520, prohibits electronic surveillance of criminal suspects unless
 15 law enforcement officials comply with specified privacy safeguards.” United
 16 States v. Staves, 383 F.3d 977, 980 (9th Cir. 2004). “The purpose of the Act is to
 17 ‘provide law enforcement officials with some of the tools thought necessary to
 18 combat crime without unnecessarily infringing upon the right of individual
 19 privacy.’” United States v. Carneiro, 861 F.2d 1171, 1176 (9th Cir. 1988)
 20 (citation omitted). “Whenever any wire or oral communication has been
 21 intercepted, no part of the contents of such communication and no evidence
 22 derived therefrom may be received in evidence in any trial . . . if the disclosure of
 23 that information would be in violation of this chapter.” 18 U.S.C. § 2515.

24 A. Standing

25 “Under the Act, only ‘aggrieved persons’ as defined in section 2510(11)
 26 may move to suppress evidence obtained through electronic surveillance.” United
 27 States v. King, 478 F.2d 494, 506 (9th Cir. 1973) (citing 18 U.S.C. § 2518(10)(a)).
 28 Section 2510(11) defines “aggrieved person” as “a person who was a party to any

1 intercepted wire, oral, or electronic communication or a person against whom the
2 interception was directed”

3 **B. “Minimization”**

4 Every order and extension thereof shall contain a provision that the
5 authorization to intercept . . . shall be conducted in such a way as to
6 minimize the interception of communications not otherwise subject to
7 interception

8 18 U.S.C. § 2518(5).

9 The United States Supreme Court has held that, in determining whether the
10 minimization requirement has been met, the district court must consider the
11 reasonableness of the interceptions in light of the purpose of the wiretap and the
12 totality of the circumstances of each case. Scott v. United States, 436 U.S. 128,
13 139-40 (1978). The Court described factors to be considered, such as percentage
14 of nonpertinent calls, duration and nature of the conversation, use of coded
15 language, pattern of calls, scope of the conspiracy, and stage of surveillance. Id. at
16 140-41. “[B]lind reliance on the percentage of nonpertinent calls intercepted is
17 not a sure guide to the correct answer.” Id. at 140.

18 “The government has the burden to show proper minimization.” United
19 States v. Torres, 908 F.2d 1417, 1423 (9th Cir. 1990). Where, as here, a defendant
20 does not challenge the introduction of specific conversations that should have
21 been minimized, the court will “only examine whether the government has shown
22 a prima facie case of compliance with the minimization requirement.” Id.

23 “The statute does not require that all conversations unrelated to the criminal
24 activity specified in the order be free from interception. Rather it requires that
25 measures be adopted to reduce the extent of such interception to a practical
26 minimum while allowing the legitimate aims of the Government to be pursued.”
27 United States v. Turner, 528 F.2d 143, 156 (9th Cir. 1975) (per curiam). Where
28 the government presents evidence that shows it made reasonable and good faith

1 efforts at minimization, its burden has been met. See id. at 157-58 (where agents
2 instructed on need for minimization and were told not to listen to irrelevant
3 conversations); Torres, 908 F.2d at 1423 (where agents instructed on
4 minimization, required to read minimization guidelines, and AUSA was made
5 available on a twenty-four hour basis for consultation). "Once the Government
6 has made a prima facie showing of reasonable minimization, the burden shifts to
7 defendants to show how more effective minimization could have taken place."
8 United States v. Bennett, 825 F. Supp. 1512, 1530 (D. Colo. 1993); accord United
9 States v. Cheely, 814 F. Supp. 1430, 1446 n.17 (D. Alaska 1992) (defendant must
10 show either that the government seeks to admit conversations that should have
11 been minimized, or that the government persisted in a pattern of interception that
12 was clearly unreasonable).

13 C. The Propriety of a Franks Hearing

14 "[W]here the defendant makes a substantial preliminary showing that a false
15 statement knowingly and intentionally, or with reckless disregard for the truth,
16 was included by the affiant in the warrant affidavit, and if the allegedly false
17 statement is necessary to the finding of probable cause, the Fourth Amendment
18 requires that a hearing be held at the defendant's request." Franks, 438 U.S. at
19 155-56. "There is, of course, a presumption of validity with respect to the
20 affidavit supporting the search warrant. To mandate an evidentiary hearing, the
21 challenger's attack must be more than conclusory and must be supported by more
22 than a mere desire to cross-examine. There must be allegations of deliberate
23 falsehood or of reckless disregard for the truth, and those allegations must be
24 accompanied by an offer of proof. . . . Allegations of negligence or innocent
25 mistake are insufficient." Id. at 171-72.

26 "A defendant is entitled to a Franks hearing if he makes a substantial
27 preliminary showing that a false statement was deliberately or recklessly included
28 in an affidavit submitted in support of a wiretap order, and the false statement was

1 material to the district court's finding of necessity." Staves, 383 F.3d at 982.
2 "False statements are material if the wiretap application purged of the false
3 statements would not support findings of probable cause and necessity." Id.
4 (citations omitted). "The lack of an affidavit or sworn statement offering proof of
5 deliberate falsehood, as required by Franks, is enough in itself to defeat [the
6 defendant's] demand for an evidentiary hearing." United States v. Ruddell, 71
7 F.3d 331, 334 (9th Cir. 1995).

8 9 III. ANALYSIS

10 A. Standing

11 At the hearing on this Motion, the government withdrew its argument that
12 Purvis has not established standing to challenge the legality of the wiretap when
13 Purvis submitted a declaration establishing standing.

14 B. The Government Took Reasonable Steps to "Minimize"

15 Purvis contends the government did not adequately minimize non-relevant
16 conversations. Purvis relies on the numbers of calls intercepted versus the number
17 of calls that were determined to be drug related, as documented in summaries
18 provided in ten day and twenty day reports. Purvis argues that failure to attempt to
19 minimize all non-relevant calls requires suppression of all intercepted
20 communications, citing United States v. George, 465 F.2d 772, 774-75 (6th Cir.
21 1972). In George conversations were intercepted in utter disregard for the
22 minimization requirements. Id. at 774. Agents were not provided with a copy of
23 the court order, nor were they given any instructions regarding minimization. Id.
24 The circumstances here are distinguishable.

25 The government argues that it instituted reasonable minimization
26 procedures. The supervising AUSA held a meeting with the monitoring agents
27 and instructed them on the minimization requirements. Sullivan Decl. ¶ 2. All
28 monitoring agents were required to read the minimization memorandum, the

1 affidavit in support of the wiretap application, and the wiretap order, and were also
2 required to agree to comply with the minimization requirements. Id. ¶¶ 3, 4.
3 Supervising agents were present in the monitoring room at all times, and the
4 AUSA was available on-call to answer minimization questions. Id. ¶ 5. These
5 procedures are consistent with those found to be reasonable in Torres, 908 F.2d at
6 1423.

7 The summaries do show a high percentage of calls intercepted that were not
8 drug related. Exhibit B to the Perez Declaration shows that 545 calls were
9 intercepted from Target Telephone 2 and only 106 were drug related. Exhibit C to
10 the Perez Declaration shows that 426 calls were intercepted from Target
11 Telephone 2 and only 71 were drug related. Exhibit D to the Perez Declaration
12 shows that 483 calls were intercepted from Target Telephone 2 and only 146 were
13 drug related. Exhibit E to the Perez Declaration shows that 388 calls were
14 intercepted from Target Telephone 2 and only 123 were drug related. Exhibit F to
15 the Perez Declaration shows that 418 calls were intercepted from Target
16 Telephone 2 and only 186 were drug related. Exhibit G to the Perez Declaration
17 shows that 412 calls were intercepted from Target Telephone 2 and only 117 were
18 drug related. Exhibit H to the Perez Declaration shows that 416 calls were
19 intercepted from Target Telephone 2 and only 144 were drug related.

20 “[B]lind reliance on the percentage of nonpertinent calls intercepted is not a
21 sure guide” to whether reasonable efforts at minimization have been made. Scott,
22 436 U.S. at 140. The government argues that the high percentage of non-relevant
23 intercepted calls is reasonable considering the circumstances of the investigation.
24 The government points to the fact that this was a complex drug conspiracy.
25 “[W]hen the investigation is focusing on what is thought to be a widespread
26 conspiracy more extensive surveillance may be justified in an attempt to determine
27 the precise scope of the enterprise.” Id.

1 The government also argues that many of the calls in this situation were
 2 very brief in duration. Of the total calls intercepted over Target Telephone 1, 94%
 3 were less than two minutes in duration. Sullivan Decl. ¶ 8. Of the total calls
 4 intercepted over Target Telephone 2, 93% were less than two minutes in duration.
 5 Id. Of the total calls intercepted over Target Telephone 3, 92% were less than two
 6 minutes in duration. Id. When "telephone calls are brief in duration, a listener
 7 frequently cannot determine a particular call's relevance to the investigation
 8 before the call has been completed." United States v. Homick, 964 F.2d 899, 903
 9 (9th Cir. 1992).

10 The government maintains that many of the calls involved coded language,
 11 making it difficult to determine whether a particular call was pertinent. Sullivan
 12 Decl. ¶ 9. "[I]t has been recognized that the use of code . . . present[s] listening
 13 officers with special problems" that justify a larger percentage of non-pertinent
 14 calls being intercepted. Turner, 528 F.2d at 158.

15 Considering all the circumstances in this case, even though a high
 16 percentage of intercepted calls were not drug related, the Court finds that
 17 minimization efforts were reasonable. See Scott, 436 U.S. at 140-41 (finding
 18 minimization reasonable even though sixty percent of intercepted calls were not
 19 relevant); Torres, 908 F.2d at 1423. The government has made a prima facie
 20 showing of reasonable minimization. Purvis has not pointed out any specific
 21 conversation that the government seeks to admit that should have been minimized.
 22 Nor has Purvis shown specifically how more effective minimization could have
 23 taken place. The Motion to Suppress is denied.

24 **C. The Propriety of a Franks Hearing**

25 Purvis argues that Sullivan made a willful or reckless false statement when
 26 he claimed:

27 based upon all the facts set forth herein, I belief [sic] that the interception of
 28 wire communications is a necessary technique to achieve the goals of this

1 investigation. The following investigative procedures have been tried and
2 have failed, reasonably appear to be unlikely to succeed if they are tried, or
3 are too dangerous to employ.

4 Vasquez & Traylor Ex. B ¶ 94. Purvis argues that the very same affidavit showed
5 that the normal investigative techniques of physical surveillance, subject
6 interviews, and undercover work were successful and productive and therefore the
7 statement that "normal investigative techniques have failed" was false. Purvis
8 argues that such a false statement was willfully made because it was repeated
9 numerous times within the Sullivan Affidavit, negating the argument that its
10 inclusion was negligent.

11 The government argues that Purvis has failed to make the requisite showing
12 of a deliberate or reckless falsehood. Purvis does not identify a single false
13 statement of *fact* or material omission of *fact*. Purvis merely takes issue with
14 Sullivan's conclusion from the facts contained within the Affidavit.

15 Purvis misunderstands the reasons a Franks hearing is available. "[W]hen
16 the Fourth Amendment demands a factual showing sufficient to comprise
17 'probable cause,' [or necessity,] the obvious assumption is that there will be a
18 *truthful* showing" Franks, 438 U.S. at 164-65 (citation omitted). "Because it
19 is the magistrate who must determine independently whether there is probable
20 cause, it would be an unthinkable imposition upon his authority if a warrant
21 affidavit, revealed after the fact to contain a deliberately or reckless false
22 statement, were to stand beyond impeachment." Id. at 165 (internal citations
23 omitted). It is clear from a review of the affidavit that Sullivan's conclusions as to
24 necessity were not material. Judge Matz is presumed to have relied on the facts
25 alleged in the Sullivan Affidavit to determine whether to make a finding of
26 necessity. There was an abundance of facts from which he could
27 have -- and clearly did -- reach this conclusion. See Vasquez & Traylor Ex. B ¶¶
28 95-110. Purvis does not argue that any of these facts are false. Purvis has not

1 established entitlement to a Franks hearing. Even if Sullivan's conclusions were
2 determined to be false, and were set aside, this Court would reach the same
3 conclusion as Judge Matz. There is no purpose to having a Franks hearing.

4
5 IT IS SO ORDERED.

6
7
8 Dated: 3-8-05

9 

Dale S. Fischer
United States District Judge